ment in default of defence had been entered on 29th November 1969.

The affidavit affirmed by Liew Kuet Hin, manager of the defendant company, stated that the judgment was entered while they were preparing to file an application for an order for further and better particulars and the plaintiffs' solicitors were aware of this. And that these particulars were necessary to enable the defendants to file their defence.

The plaintiffs in their affidavit contend that the defendants are not entitled to the particulars asked for. It was the practice of the plaintiffs to give their customers at the time of delivery of the goods, an invoice stating the nature, quantity, price per unit and delivery price, of goods then delivered. Again at the end of the month, a monthly statement was prepared. stating reference to invoice, quantity and costs of goods delivered during the month and payments received during the same month.

The application was adjourned to open court for hearing. Mr. L. M. Ong, counsel for the defendants argued that judgment in default was premature and that at the time when judgment was entered, time for delivery of the defence had not run out or expired. He submitted that time runs from the time the plaintiffs' solicitors refused to furnish the particulars. He cited the case of *Soona Sanmugam* v. *Wee Teow Beng & Anor*,[1] where it was held that —

"Order XIX, Rule 7A, of the English Rules of the Supreme Court, has effect in the Colony by virtue of s. 3 of the Civil Procedure Code. It enables a party to a suit to apply by letter for particulars before resorting to a summons. A request for particulars by letter is not complied with until all the particulars are given. The time for the next subsequent pleading runs from the date on which all the particulars required have been given."

In that case, the particulars were delivered. The learned judge considered the effect of the delivery of particulars on request by letter in the light of section 241 of the Civil Procedure Code, which is similar to the existing rule 8 Order 19 of our Rules of the Supreme Court which reads —

"The party at whose instance particulars have been delivered under a judge's order, shall unless the order otherwise provides, have the same length of time for pleading after the delivery of the particulars that he had at the return of the summons."

Murison C.J. at pp.93 and 94 said —

"... It would appear, therefore that rule 7A of the Rules of the Supreme Court is applicable in the Colony, so that an application for particulars by letter is to be treated in the same way as an order for particulars made by a judge under section 241 of the Code."

It is clear from the judgment that when his Lordship referred to "an application for particulars by letter" he was in effect referring to an application which had been complied with. In the present case, however, the application for particulars by letter was refused. That being the case, the principles laid down in *Soona Sanmugam, supra*, have to be viewed in the light of that distinction.

Rule 8 of Order 19 apparently is not intended to operate, unless the order otherwise provides, as a stay of proceedings or to give any extension of time. The intention, I think, is to confer on the party at whose instance *particulars have been delivered* at a judge's order (or when delivered on application by letter under rule 7A), the same length of time for pleading after delivery of the particulars that he had at the return of the summons. Consequently —

"... The time for the next subsequent pleading runs from the date on which all particulars required have been given." *(Soona Sanmugam, supra).*

Where on an application by letter for further and better particulars under rule 7A Order 19, the application is refused, and no application is made for a judge's order for particulars and no defence is filed within the time limited for delivery of the defence, any judgment obtained in default of the defence, unless the contrary is shown, must be deemed to be regularly obtained. Having regard to the circumstances of this particular case, I am satisfied that the judgment in default was regular and that at the time when such judgment was entered, the time for delivery of defence had expired.

The only other remaining question for me to consider in this case is whether this is a proper case for me to exercise my discretion and set aside the judgment in default. In exercising the discretion, the court follows certain determined and well-defined principles. Lord Atkin, in *Evans* v. *Bartlam*[2] at page 480 said —

"... The courts, however, have laid down for themselves rules to guide them in the normal exercise of their discretion. One is that where the judgment was obtained regularly there must be an affidavit of merits, meaning that the applicant must produce to the court evidence that he has a *prima facie* defence."

In the instant case, the judgment in default of defence having been regularly obtained, the court has to consider whether the applicant has produced evidence to show that he has a *prime facie* defence. The affidavit affirmed in support of this application has not disclosed any evidence that the defendants on the merits have a *prima facie* defence.

For these reasons, I dismiss the application with costs.

Application dismissed.

Solicitors: *Shook Lin & Bok*; *L. M. Ong.*

PUBLIC PROSECUTOR v. WAN RAZALI KASSIM

[F.C. (Azmi L.P., Ismail Khan C.J. (Borneo) & Lee Hun Hoe J.) April 16, 1970]

[Kuching — Federal Court Criminal Appeal No. X.2 of 1969]

Criminal Law and Procedure — Appeal — Whether appellate court should interfere with finding of fact by lower court.

The Public Prosecutor referred to the Federal Court the following question under section 66(2) of the Courts of Judicature Act, 1964,

"If a magistrate, without misdirecting himself, has made a finding of fact based on actual evidence before him, which finding of fact is corroborated in material particulars by inferences reasonably and properly drawn

by him from other evidence adduced before him, and such magistrate has convicted the accused as a result of such finding of fact, such conviction not being against the weight of evidence in the case, is it open to a judge of the High Court, on hearing an appeal against such conviction, to upset or interfere with such finding of fact?"

The learned judge who heard the appeal in this case had quashed the conviction of the accused. He said that the evidence against the accused was dependent merely on inferences of fact and that in this case the learned magistrate should have drawn the inferences which were favourable to the accused person. The learned judge was also influenced by the fact, as he put it, that the accused had specifically noted the number of the insurance policy in the station diary — but in fact this was not true.

Held: an appellate court should be slow to interfere with the finding of fact by a lower court as an appellate court does not have the advantage of seeing and hearing the witnesses and therefore of assessing their credibility. In this case, on the evidence, the learned judge was wrong in quashing the conviction. Therefore the answer to the reference is in the negative.

Case referred to:-

(1) *Tan Chow Soo* v. *Ratna Ammal* [1969] 2 M.L.J. 49 at p. 50.

FEDERAL COURT.

Geoffrey Grimmett (Crown Counsel) for the applicant.

Daniel Tajem for the respondent.

Azmi L.P.: The following question which arose out of Kuching High Court Appeal No. K. 8 of 1969 *Wan Razali Kassim* v. *The Public Prosecutor* was referred to the Federal Court by the learned Public Prosecutor under section 66(2) of the Courts of Judicature Act 1964,

"If a magistrate, without misdirecting himself, has made a finding of fact based on actual evidence before him, which finding of fact is corroborated in material particulars by inferences reasonably and properly drawn by him from other evidence adduced before him, and such magistrate has convicted the accused as a result of such finding of fact, such conviction not being against the weight of evidence in the case, is it open to a judge of the High Court, on hearing an appeal against such conviction, to upset or interfere with such finding of fact?"

Wan Razali Kassim, hereinafter referred to as the accused, was convicted by the learned first class magistrate on a charge of corruptly accepting $40 from one Ho Shan Jan (hereinafter referred to as P.W. 3) as an inducement for forbearing from taking action against P.W. 3 for using a motor cycle whilst he was not covered by a third party risk insurance policy as required by the Road Traffic Legislation, an offence punishable under section 4(a) of the Prevention of Corruption Act 1961 and was sentenced to 6 months' imprisonment. He appealed against the conviction and sentence to the High Court at Kuching and his conviction and sentence were quashed by the appellate court.

The evidence for the prosecution may be summarised as follows:

P.W. 3 whilst driving a motor cycle on 9th December 1968, in Kuching met with an accident and as a result he, his pillion rider and a pedestrian were injured. Whilst at the hospital he was interrogated by the accused who apparently with another senior officer was investigating the matter. P.W. 3 was discharged the same evening but was told by accused to see him again at the police station and to bring the insurance policy covering the use of the motor cycle.

P.W. 3 accordingly saw the accused on 11th December and showed him the insurance policy. It transpired that the policy did not cover P.W. 3 but only his father the owner of the vehicle. The accused thereupon explained to P.W. 3 that he had, in the circumstances, committed an offence and for that he could be fined $50 or $100, but at the same time informed P.W. 3 that he could help in the matter. Accused told P.W. 3 to go away and wait as he wished to speak to another man who then appeared. After apparently consulting the other man the accused asked P.W. 3 how much he was prepared to pay. Finally it was agreed between the two of them that P.W. 3 should pay $40 to the accused but when the accused said that he had no money then, it was further agreed that they should meet again the same evening at a bus station in the town at 8 p.m. and the accused also requested P.W. 3 to put the money in an envelope.

After this meeting with the accused, P.W. 3 went to see a friend, a police mechanic and told him what had transpired. As a result P.W. 3 was taken to see A.S.P. Chai. After hearing P.W. 3's story, A.S.P. Chai planned a trap for the accused. He told P.W. 3 to meet him at 7.30 p.m. the same evening at a certain place.

As part of the plan senior inspector Dollah dusted four $10 notes with anthracene powder, which under ordinary light is colourless but under ultra violet light would give a green or blue flourescence colour. A.S.P. Chai then placed the dusted notes in an envelope after the envelope had also been dusted with anthracene powder. They were then put into another but clean envelope. The whole bundle was handed to P.W. 3 who was to hand over the dusted envelope to the accused at the agreed meeting place.

P.W. 3 arrived at the rendezvous and met the accused. He handed the dusted envelope and money to the accused who took out the money from the envelope, counted it, put it back into the envelope and pushed it into his pocket. Then suddenly, according to P.W. 3, accused took the envelope out of his pocket and pushed it into P.W. 3's pocket and as he did so remarked about seeing two suspicious persons around. He then went to fetch his motor cycle, apparently somewhere nearby, came back and told P.W. 3 to sit on the pillion. He said that he was going to his house for the insurance policy which he said he would return to P.W. 3. Some conversation took place and finally they agreed that accused alone would cross the river to his house to fetch the insurance policy and P.W. 3 was to wait at the ferry terminal near the suspension bridge. In the meantime A.S.P. Chai and other officers were waiting in the vicinity of the bus station. A.S.P. Chai and inspector Peter Lim said they saw P.W. 3 and the accused meet and talk to each other but somehow lost sight of them. After searching for sometime they all returned to the police station. They discussed the situation and decided to go and lay in wait at the suspension bridge.

According to P.W. 3, the accused left him at the river bank at the spot where there was a sign board, whilst the accused crossed over to the other side to fetch the insurance policy.

We might pause here to explain that according to the sketch plan of the scene, a short distance before reaching the suspension bridge on Satok Road, another road branches out and leads to the ferry terminal on the bank of the river.

When the police party arrived at the second scene, inspector Peter Lim was placed in ambush position at the junction of the two roads. A.S.P. Ha with A.S.P. Chai were waiting in the car on the branch road to the ferry terminal. Whilst waiting near the car A.S.P. Ha noticed a stationary motor cycle at the sign board about 100 feet away. They then drove the car towards the motor cycle and then saw it moving towards them. When they got to about 20 feet from the motor cycle they recognized the rider and the pillion rider. They shouted out accused's name and told him to stop. Instead the motor cycle turned round and drove back towards the river. Finally, it stopped about 20 feet away from the car. They rushed out and examined the person of the accused. They could not find the money on him.

Now to go back to P.W. 3's story. When they got to the bank of the river he waited at the sign board and the accused crossed by ferry to the other side and then later came back. P.W. 3 handed back the envelope with the money to the accused and the accused gave him the insurance policy. The accused took out the money from the envelope, put the money in his pocket, crumpled the envelope into a ball and threw it at the spot. They decided to return to town and as they were driving away he saw a car coming towards them and stop and some one called out the accused's name.

A search of the area was made. The crumpled envelope was found near the sign post and some money was found on the sand near the river bank.

The accused gave evidence on oath.

His story was that he met P.W. 3 near the bus station by accident. P.W. 3 opened the subject of the accident and the accused informed him that he would not know whether P.W. 3 would be prosecuted or not. P.W. 3 then asked for the return of his insurance certificate which accused had kept with him in his house. Since he insisted on having the insurance policy accused agreed to go home and fetch it. At that time P.W. 3 handed accused an envelope which accused returned to him. Then they proceeded to the suspension bridge. Accused went home alone and fetched the insurance certificate, whilst P.W. 3 was waiting near the bank of the river. When accused returned and both got on the motor cycle, they proceeded slowly. On reaching the junction of the two roads P.W. 3 asked that he wished to go to a dark place to ease himself. On reaching there about 100 feet before the junction P.W. 3 asked him to stop which he did. Then accused felt P.W. 3 putting his hand into his hip pocket, whereupon accused grabbed at the hand and questioned P.W. 3. There was some conversation between them but finally accused returned the money by handing over his left shoulder with his right hand and sternly warned P.W. 3 against doing that kind of thing again. Then they proceeded towards the direction of the ferry and made a 'U' turn. As he was doing that a motor car without any light came from behind and stopped in front of them. Two officers came out and indicated they wanted to search the accused. He then exclaimed "What is it about Sir?" They told him the reason and stopped accused from talking. They searched him and found nothing on him. Later he heard A.S.P. Ha shouting that the money was found about 30 feet away and not 3 feet as stated by the prosecution. In cross-examination he said he did not get any receipt for handing over the certificate to P.W. 3 because he said he trusted him. He denied throwing the money when he saw the other police officers.

Two other persons gave evidence for the defence. D.W. 2 said he was at the ferry at the time of the incident but denied that he knew that it was the accused who was searched. He said he saw somebody pick the money on the side of the road. According to D.W. 3 he said the persons searching the place found some $10 notes close to the ferry on the side of a heap of sand and about 30 feet from the car.

The learned magistrate disbelieved the story of the accused because according to the magistrate if it was true that P.W. 3 had given him the money and he rejected it he should have placed P.W. 3 under arrest for attempting to bribe him. He thereupon convicted him.

Although the magistrate did not say in so many words, in our view the magistrate had made the following finding of facts: —

(1) That the meeting at the bus station between P.W. 3 and the accused was not accidental as the accused alleged.

(2) That accused took P.W. 3 to the suspension bridge because he was aware he was being watched by others at the bus station.

(3) The fact that he returned the insurance certificate the same night when he could and should have handed it over at the police station, was consistent with the version of the story as told by P.W. 3.

(4) The finding of the money where the accused made a 'U' turn was also consistent with the story of the prosecution.

(5) Accused's failure to stop when challenged to do so.

(6) So was the fact that no entry was made in the station diary or report book or diary of the accused regarding the offence committed by P.W. 3.

In our view all these findings are evidence that give support to the story given by P.W. 3. On the whole, we come to the view that the learned magistrate was right in finding the accused guilty.

Let us turn to the judgment of the learned judge. The learned judge with respect, quite rightly on the question of law came to the view that the evidence of

P.W. 3 who was believed was not that of an accomplice, nor was the failure to produce a report against the accused fatal to the prosecution case in this case. But finally the learned judge allowed the appeal and quashed the conviction. In our view the judgment of the learned judge was not as clear as it should be. He failed to refer for instance to the evidence of P.W. 3, except to say that such a person is not an accomplice whose evidence would require corroboration. The learned judge then went on to say as follows: —

"The trial court in its judgment speaks of inferences drawn from the conduct and behaviour of accused and particular pieces of evidence such as meeting at hospital, the bus station, the suspension bridge and the handing back of insurance certificate that very night and the fact that accused failed to stop immediately when ordered to do so. To be valid, inferences must comply with two conditions. First, it must account for all the known facts and secondly it must be the only reasonable inference which will account for all these facts."

He then referred to how a court should consider where facts lead to more than one inference and in our view with respect, quite rightly said that in such instances an inference most favourable to an accused person should be adopted.

Finally, the judge came to the view (and I quote him):

"Much is made of accused's movements on the 11th December, 1968 but to my mind there is nothing that he did on that day which is incapable of innocent explanation. In dealing with a case of the present description therefore depending on inferences mere conjecture cannot be allowed to take the place of legal proof of facts by the prosecution."

With respect, we disagree with the learned judge that the evidence against the accused was dependent merely on inferences of facts. As we explained previously the case against the accused was dependent upon the evidence of P.W. 3 and his evidence was supported by other evidence.

There is another point we should mention. The learned judge seemed to be strongly influenced by the fact, as he put it, that the accused had specifically noted the number of the insurance policy in the station diary. It was pointed out to us that that finding made by the learned judge was wrong. The only evidence in reference to this was that of the accused himself who stated "I copied the number of the insurance policy etc. at the back of his statement." We were referred to Exhibit P. 6 — the relevant station diary, containing an entry made by the accused in reference to the accident. There is no reference to P.W. 3 or the fact that he was driving a motor cycle without a third party risks insurance. We therefore come to the conclusion that the learned judge on the evidence was wrong in quashing the conviction. An appellate court should be slow to interfere with the finding of fact by a lower court as an appellate court does not have the advantage of seeing and hearing the witnesses and therefore of assessing their credibility. As Lord Diplock had stated in *Tan Chow Soo* v. *Ratna Ammal*[1]:—

"An appellate court, particularly where there is no full transcript of the oral evidence, is in a far less advantageous position to decide an issue of credibility than the trial judge who heard the evidence in full and observed the witnesses as they gave it, noting their pauses and their hesitations and any visible signs of confidence or embarrassment."

It is also obvious that the learned judge had been seriously influenced by his assumption, which we have explained was wrong, of the existence of the entry about the insurance policy in the station diary and had he been aware of his mistake he might have decided the appeal differently.

We would therefore say that the answer to the reference is in the negative. In the circumstances we set aside the judgment of the learned judge and restore the conviction and sentence made by the learned magistrate.

Answer in the negative.
Conviction and sentence restored.

RINYA ANAK KASSI v. WONG SIE KING

[F.C. (Azmi L.P., Ismail Khan C.J. (Borneo), Lee Han Hoe J.)
April 16, 1970]

[Kuching — Federal Court Civil Appeal No. 2 of 1970]

Practice and Procedure — Action against estate of deceased person — Requirement that cause of action arose not earlier than 6 months before the death of the deceased — Sarawak Application of Laws Ordinance (Cap. 2), ss. 2 & 3 — Law Reform (Miscellaneous Provisions) Act, 1934, s. 1(3) (b) — Whether Act applies in Sarawak — Law of general application.

The plaintiff's taxi was involved in a collision with a car driven by one Kadam. The taxi was a total wreck as a result of the accident. About nine months later Kadam was fatally injured in another accident. After the grant of representation to his estate the plaintiff commenced an action against the defendant as administratrix of the estate of the deceased claiming damages for the loss of his taxi. The defendant in her defence denied negligence and pleaded that the claim was barred by the Law Reform (Miscellaneous Provisions) Act, 1934. The objection in law was taken as a preliminary point and the learned judge held that the action was maintainable. The defendant appealed.

Held, allowing the appeal: as the cause of action in this case arose earlier than six months before the death of the deceased, the action was not maintainable.

Cases referred to:-

(1) *Ong Ah Ngim* v. *Lau Kiok Kia* [1956] S.C.R. (Sarawak) 7.

(2) *Airey* v. *Airey* [1958] 2 Q.B. 300.

(3) *Rose* v. *Ford* [1937] A.C. 826.

(4) *Davies & Anor.* v. *Powell Duffryn Associated Collieries, Ltd.* [1942] A.C. 601.

FEDERAL COURT.

Daniel Tajem for the appellant.

Joseph Tong for the respondent.

Cur. Adv. Vult.

Ismail Khan C.J. (Borneo): On or about the 22nd September 1967 at about 4 p.m. the plaintiff's taxi No. S.4527 was involved in a collision with a car No. KA4937 driven by one Kadam anak Kiai at the 6½ Mile Repok Road, Sarikei.

The taxi was a total wreck as a result of the accident. About nine months later, on the 27th of June 1968 Kadam anak Kiai, hereinafter called the deceased, was fatally injured in another accident.